IN THE

Supreme Court of the United States

No. 217

STATE OF OHIO EX REL. RODNEY P. LIEN, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO, IN CHARGE OF THE LIQUIDATION OF THE OHIO SAVINGS BANK & TRUST COMPANY,

Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER

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The cases of *United States of America vs. James E. O'Donnell et al.*, 303 U. S. 501, and *General Talking Pictures Corp. vs. Western Electric Co.*, 304 U. S. 175, cited on page 7 of the respondent's brief, follow the rule announced in the case of *Virginian Railway vs. Federation*, 300 U. S. 515, which is cited on page 19 of petitioner's brief, that rule being that this court will accept findings concurred in by both of the courts below if, but only if, they are not plainly erroneous or unsupported by the evidence.

Our claim has been and is that the controlling conclusions of fact of the District Court were plainly erroneous and were unsupported by the evidence, and that the District Court was led into this error by its failure to distinguish

between the change of procedure followed by the Bank and Metropolitan before July 31, 1926, and after July 31, 1926, and the failure of the District Court to recognize the material changes in the agreement between the parties which resulted in that change of procedure.

Prior to July 31, 1926, the Bank was expected to forward to Metropolitan only such interest and principal payments as were actually collected by it, which fact is established by, and is the only material fact established by, the letter of Metropolitan to the Bank of July 1, 1926 (97), the letter of Metropolitan to the Bank of July 14, 1926 (99), and the letter from the Bank to Metropolitan of January 21, 1926 (93), which are referred to and relied upon by the respondent. These letters have no other or further relevancy in this case.

After July 31, 1926, the Bank was obligated at the end of each week to forward to Metropolitan an amount equal to all principal and interest payments due during that week, and the Bank was so billed by Metropolitan. This change in procedure was recognized by the stipulation of the parties (107), and the fact that it took place is established beyond question by the letter from the Bank to Metropolitan of July 31, 1926 (102) and the letter from Metropolitan to the Bank of Sept. 2, 1926 (227). This change in procedure took place as a direct result of a letter from Metropolitan to the Bank of July 14, 1926 (99), and of one or more conferences between the parties culminating in the telegram from the Bank to Metropolitan of July 29, 1926 (101).

The plain mistake of the District Court, which was erroneously concurred in by the Court of Appeals, is apparent from the fact that in the opinion of the District Court it relies entirely for support of its conclusions upon

the wholly immaterial correspondence between the parties prior to the letter of July 14, 1926.

The court makes no mention of the admitted change in the agreement and practice as of July 31, 1926, and wholly ignores the all-important letter of September 2, 1926, and fails to recognize the necessary legal effect of the material change evidenced thereby.

When the facts, as stipulated, are accepted as true, as they must be, and when it is recognized that after July 31, 1926, the Bank did in fact at the end of each week do that which was expected of it and required of it by Metropolitan's billings, *i.e.*, sent to Metropolitan an amount equal to the payments of principal and interest which became due during that week, it follows—(a) that these remittances were not voluntary in the legal sense of that term, (b) that Metropolitan requested that they be made and knew that they were being made, and (c) that they were not intended as payments on behalf of the mortgagors but were for the sole benefit of Metropolitan.

The respondent refers (its brief, page 12) to the case of *State ex rel. Fulton, Supt. of Banks vs. Dean,* 47 O. App. 558, as establishing the Ohio law to be that an executed contract cannot be disaffirmed on the ground that it is *ultra vires.* That case actually holds exactly the contrary. It recognizes the right of the Superintendent of Banks to disaffirm a contract whereunder the Bank had given collateral as security for a short term deposit, but insists upon the return by the Superintendent of Banks of the amount by which the Bank had been enriched thereby.

Here we have no such problem, and the case is in point only in so far as it supports the right of this petitioner to recover because of the *ultra vires* nature of the transaction here involved.

In the foregoing we find, therefore, an answer to every contention of the respondent and full justification for the exercise by this court of its supervisory jurisdiction to the end that the wrong done to this petitioner by the judgments below may be corrected.

Respectfully submitted,

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